

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

AMALIA VILLA,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security
Administration,

Defendant.

Case No. 2:15-cv-01392-JAD-CWH

REPORT AND RECOMMENDATION

This matter was referred to the undersigned Magistrate Judge for a report of findings and recommendations under 28 U.S.C. § 636(b)(1)(B)-(C) and Local Rule IB 1-4. The case involves review of an administrative action by the Commissioner of Social Security (“Commissioner”) denying Plaintiff Amalia Villa’s (“Plaintiff”) application for disability insurance benefits under Title II of the Social Security Act. The Court has reviewed Plaintiff’s motion for reversal/remand (ECF No. 16), filed March 14, 2016, the Commissioner’s response and cross-motion to affirm (ECF Nos. 17, 18), filed April 13, 2016, and Plaintiff’s Reply (ECF No. 19), filed May 3, 2016.

BACKGROUND

1. Procedural History

On March 27, 2012, Plaintiff applied for disability insurance benefits, alleging an onset date of October 1, 2010. AR¹ 140-148. Plaintiff’s claim was denied initially on September 6, 2012, and upon reconsideration on March 13, 2013. AR 66-77. Administrative Law Judge David K. Gatto conducted a hearing on November 19, 2013, AR 44-55, and on January 21, 2014, issued an unfavorable determination. AR 23-41. The ALJ’s decision became the Commissioner’s final decision when the Appeals Council denied review on June 24, 2015. AR 1-9. Plaintiff, on July 21, 2015, commenced

¹ AR refers to the Administrative Record in this matter. (Notice of Administrative Filing (ECF No. 13).)

1 this action for judicial review under 42 U.S.C. §§ 405(g). *See* ECF Nos. 1, 3.

2 **2. The ALJ Decision**

3 The ALJ followed the five-step sequential evaluation process set forth in 20 C.F.R.
 4 §§ 404.1520 and 416.920. AR 29-31. At step one, the ALJ found that Plaintiff had not engaged in
 5 substantial gainful activity from the alleged onset date of October 1, 2010. AR 31. At step two, the
 6 ALJ found that Plaintiff had medically determinable “severe” impairments of status post fusion of the
 7 lumbar spine with lumbar spondylosis at L4 through S1 with history of chronic low back pain. *Id.* At
 8 step three, the ALJ found that Plaintiff did not have an impairment or combination of impairments that
 9 met or medically equaled a listed impairment in 20 CFR Part 404, Subpart P, Appendix 1. *Id.* Under
 10 step four, the ALJ found that Plaintiff had the residual functional capacity to perform light work as
 11 defined in 20 CFR 404.1567(b) except she may never climb ladders, ropes, and scaffolds. AR 32. She
 12 may occasionally be exposed to wetness, hazards, and dangerous moving machinery. *Id.* The ALJ
 13 found that Plaintiff could not perform her past relevant work. AR 36. The ALJ classified Plaintiff as a
 14 younger individual on the alleged disability date. *Id.* The ALJ categorized Plaintiff as possessing a
 15 limited education and the ability to communicate in English. *Id.* The ALJ accepted testimony of a
 16 vocational expert that an individual of Plaintiff’s age, education, work experience, and residual
 17 functional capacity could perform the work of fast food worker, ticketer and electronic assembler. AR
 18 37. Accordingly, the ALJ concluded that Plaintiff was not under a disability at any time from October
 19 1, 2010, the alleged onset date, through the date of the decision. AR 38.

20 **DISCUSSION**

21 **1. Standard of Review**

22 Administrative decisions in social security disability benefits cases are reviewed under 42
 23 U.S.C. § 405(g). *See Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002). Section 405(g) states:
 24 “Any individual, after any final decision of the Commissioner of Social Security made after a hearing
 25 to which he was a party, irrespective of the amount in controversy, may obtain a review of such
 26 decision by a civil action . . . brought in the district court of the United States for the judicial district in
 27 which the plaintiff resides.” The court may enter “upon the pleadings and transcripts of the record, a
 28 judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with

1 or without remanding the cause for a rehearing.” *Id.* The Ninth Circuit reviews a decision affirming,
2 modifying or reversing a decision of the Commissioner *de novo*. *See Batson v. Commissioner*, 359
3 F.3d 1190, 1193 (9th Cir. 2004).

4 The Commissioner’s findings of fact are conclusive if supported by substantial evidence. *See*
5 42 U.S.C. § 405(g); *Ukolov v. Barnhart*, 420 F.3d 1002 (9th Cir. 2005). However, the Commissioner’s
6 findings may be set aside if they are based on legal error or not supported by substantial evidence. *See*
7 *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir. 2006); *Thomas v. Barnhart*, 278 F.3d
8 947, 954 (9th Cir. 2002). The Ninth Circuit defines substantial evidence as “more than a mere scintilla
9 but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as
10 adequate to support a conclusion.” *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995); *see also*
11 *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n. 1 (9th Cir. 2005). In determining whether the
12 Commissioner’s findings are supported by substantial evidence, the court “must review the
13 administrative record as a whole, weighing both the evidence that supports and the evidence that
14 detracts from the Commissioner’s conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998);
15 *see also Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996).

16 Under the substantial evidence test, findings must be upheld if supported by inferences
17 reasonably drawn from the record. *Batson*, 359 F.3d at 1193. When the evidence will support more
18 than one rational interpretation, the court must defer to the Commissioner’s interpretation. *See Burch*
19 *v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005); *Flaten v. Sec’y of Health and Human Serv.*, 44 F.3d
20 1453, 1457 (9th Cir. 1995). Consequently, the issue before the court is not whether the Commissioner
21 could reasonably have reached a different conclusion, but whether the final decision is supported by
22 substantial evidence. It is incumbent on the ALJ to make specific findings so that the court does not
23 speculate as to the basis of the findings when determining if the Commissioner’s decision is supported
24 by substantial evidence. Mere cursory findings of fact without explicit statements as to what portions
25 of the evidence were accepted or rejected are not sufficient. *Lewin v. Schweiker*, 654 F.2d 631, 634
26 (9th Cir. 1981). The ALJ’s findings “should be as comprehensive and analytical as feasible, and where
27 appropriate, should include a statement of subordinate factual foundations on which the ultimate
28 factual conclusions are based.” *Id.*

2. Disability Evaluation Process

The individual seeking disability benefits has the initial burden of proving disability. *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir 1995). To meet this burden, the individual must demonstrate the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A). More specifically, the individual must provide “specific medical evidence” in support of her claim for disability. 20 C.F.R. § 404.1514. If the individual establishes an inability to perform her prior work, then the burden shifts to the Commissioner to show that the individual can perform other substantial gainful work that exists in the national economy. *Batson*, 157 F.3d at 721.

The ALJ follows a five-step sequential evaluation process in determining whether an individual is disabled. *See* 20 C.F.R. § 404.1520; *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987). If at any step the ALJ determines that he can make a finding of disability or nondisability, a determination will be made and no further evaluation is required. *See* 20 C.F.R. § 404.1520(a)(4); *Barnhart v. Thomas*, 540 U.S. 20, 24 (2003). Step one requires the ALJ to determine whether the individual is engaged in substantial gainful activity (“SGA”). 20 C.F.R. § 404.1520(b). SGA is defined as work activity that is both substantial and gainful; it involves doing significant physical or mental activities usually for pay or profit. *Id.* § 404.1572(a)-(b). If the individual is engaged in SGA, then a finding of not disabled is made. If the individual is not engaged in SGA, then the analysis proceeds to the step two.

Step two addresses whether the individual has a medically determinable impairment that is severe or a combination of impairments that significantly limits her from performing basic work activities. *Id.* § 404.1520(c). An impairment or combination of impairments is not severe when medical and other evidence establishes only a slight abnormality or a combination of slight abnormalities that would have no more than a minimal effect on the individual’s ability to work. *Id.* § 404.1521; *see also* Social Security Rulings (“SSRs”) 85-28, 96-3p, and 96-4p.² If the individual does not have a severe medically determinable impairment or combination of impairments, then a

² SSRs constitute the SSA’s official interpretation of the statute and regulations. *See Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1224 (9th Cir. 2009); *see also* 20 C.F.R. § 402.35(b)(1). They are entitled to some deference as long as they are consistent with the Social Security Act and regulations. *Bray*, 554 F.3d at 1223 (finding ALJ erred in disregarding SSR 82-41).

1 finding of not disabled is made. If the individual has a severe medically determinable impairment or
2 combination of impairments, then the analysis proceeds to step three.

3 Step three requires the ALJ to determine whether the individual's impairments or combination
4 of impairments meet or medically equal the criteria of an impairment listed in 20 C.F.R. Part 404,
5 Subpart P, Appendix 1. 20 C.F.R. §§ 404.1520(d), 404.1525, and 404.1526. If the individual's
6 impairment or combination of impairments meet or equal the criteria of a listing and the duration
7 requirement (20 C.F.R. § 404.1509), then a finding of disabled is made. 20 C.F.R. § 404.1520(h). If
8 the individual's impairment or combination of impairments does not meet or equal the criteria of a
9 listing or meet the duration requirement, then the analysis proceeds to step four.

10 Before moving to step four, however, the ALJ must first determine the individual's residual
11 functional capacity ("RFC"), which is a function-by-function assessment of the individual's ability to
12 do physical and mental work-related activities on a sustained basis despite limitations from
13 impairments. *See* 20 C.F.R. § 404.1520(e); *see also* SSR 96-8p. In making this finding, the ALJ must
14 consider all the relevant evidence, such as all symptoms and the extent to which the symptoms can
15 reasonably be accepted as consistent with the objective medical evidence and other evidence. 20
16 C.F.R. § 404.1529; *see also* SSRs 96-4p and 96-7p. To the extent that statements about the intensity,
17 persistence, or functionally limiting effects of pain or other symptoms are not substantiated by
18 objective medical evidence, the ALJ must make a finding on the credibility of the individual's
19 statements based on a consideration of the entire case record. The ALJ must also consider opinion
20 evidence in accordance with the requirements of 20 C.F.R. § 404.1527 and SSRs 96-2p, 96-5p, 96-6p,
21 and 06-3p.

22 Step four requires the ALJ to determine whether the individual has the RFC to perform her past
23 relevant work ("PRW"). 20 C.F.R. § 404.1520(f). PRW means work performed either as the
24 individual actually performed it or as it is generally performed in the national economy within the last
25 15 years or 15 years before the date that disability must be established. In addition, the work must have
26 lasted long enough for the individual to learn the job and performed at SGA. 20 C.F.R. §§ 404.1560(b)
27 and 404.1565. If the individual has the RFC to perform her past work, then a finding of not disabled is
28 made. If the individual is unable to perform any PRW or does not have any PRW, then the analysis

1 proceeds to step five.

2 The fifth and final step requires the ALJ to determine whether the individual is able to do any
3 other work considering her RFC, age, education, and work experience. 20 C.F.R. § 404.1520(g). If
4 she is able to do other work, then a finding of not disabled is made. Although the individual generally
5 continues to have the burden of proving disability at this step, a limited burden of going forward with
6 the evidence shifts to the Commissioner. The Commissioner is responsible for providing evidence that
7 demonstrates that other work exists in significant numbers in the national economy that the individual
8 can do. *Yuckert*, 482 U.S. at 141-42.

9 **3. Analysis**

10 Plaintiff seeks reversal of the ALJ's decision because he failed to give sufficient weight to the
11 opinion of Dr. David Mumford, M.D., who opined that Plaintiff can occasionally balance, never
12 stoop/bend, occasionally kneel; never crouch/squat; and never crawl. Plaintiff argues that the ALJ
13 essentially rejected Dr. Mumford's opinions because the low back pain would not be as limiting as
14 found, and Plaintiff's work, erroneously identified as a retail clerk, in 2011. Plaintiff notes that she
15 worked as a caretaker, not a retail clerk, in 2011. Plaintiff therefore concludes that the ALJ's reasons
16 were not sufficiently specific, and are simply the ALJ's unsupported conclusions. The Commissioner
17 responds that the ALJ properly considered and gave weight to the portions of Dr. Mumford's opinion
18 that were consistent with his examination finding and the record as a whole, and substantial evidence
19 supports his decision.

20 In assessing the Plaintiff's RFC, and in extensively discussing Dr. Mumford's findings, the ALJ
21 found that there were significant limitations alleged by Plaintiff that were unsupported by the record,
22 and that Plaintiff was not credible. For example, the ALJ noted that although Plaintiff complained
23 about persistent pain in her shoulders, elbows, wrist, hands, knees, ankles, and feet, her pain had not
24 been diagnosed and she had not sought medical attention for these problems. The ALJ explained that
25 Plaintiff would not have significant standing, walking, or sitting restrictions because Dr. Mumford
26 found no objective evidence of any impairment that would limit the Plaintiff's ability to do so, despite
27 her allegations. In arriving at his conclusions, the ALJ considered Plaintiff's poor work history, clear
28 motivation for secondary gain, history of routine treatment incommensurate with the alleged severity of

1 her symptoms, activities of daily living including working as a caretaker while alleging disability, the
2 lack of objective evidentiary support, and evidence of treatment effectiveness. AR 32-33, 35-36. The
3 ALJ reviewed, in detail, the findings of Dr. Mumford, and the various allegations made by Plaintiff,
4 and gave the findings some weight, but simply did not adopt the opinion as to postural limitations set
5 forth by Dr. Mumford. The ALJ did indicate that Plaintiff “worked as an in-home personal care
6 attendant during after (sic) her alleged disability onset date,” AR 32, and then erroneously also
7 indicated that in 2011 she “was required to engage in these activities occasionally as a *retail clerk*” and
8 “received no special accommodations.” AR 34 (emphasis added). It appears that the reference to
9 Plaintiff’s work as a retail clerk was erroneous—Plaintiff testified that she worked for several years
10 taking care of adult residents after 2010, when she claimed she was disabled. AR 48. Although not
11 substantial gainful activity as that term is defined, it suggested to the ALJ that Plaintiff was not as
12 limited as she alleged. The ALJ discounted Dr. Mumford’s postural limitations because they were
13 supported only by Plaintiff’s discredited subjective complaints, which the ALJ found to be not credible
14 based upon “objective medical signs and findings of the record as a whole under SSR 96-7p.” AR 33.
15 The Court finds the ALJ’s conclusions supported by substantial evidence in the record.

16 Plaintiff also argues that the ALJ failed to address or give weight to the opinions of the state
17 agency physicians, Dr. Dougan and Dr. Villaflor, who opined that Plaintiff had some postural
18 limitations, and that the vocational expert identified occupations which require some of the postural
19 limitations that were assessed. Plaintiff does not identify those postural limitations, nor outline their
20 relevance to the occupations identified by the vocational expert. The Commissioner responds that the
21 State agency medical opinions merely summarized the evidence already discussed by the ALJ, and did
22 not add substantive evidence not already considered, so any failure by the ALJ to discuss those
23 summaries was harmless. The Court finds that the ALJ set forth a detailed and thorough summary of
24 the facts and conflicting clinical evidence, and appropriately assessed the medical evidence. Plaintiff
25 has failed to show any prejudice which may have resulted from the failure to fully discuss Dr. Dougan
26 and Villaflor’s postural limitations, and so if it was erroneous, it was harmless.

27 ///

28 ///

CONCLUSION AND RECOMMENDATION

Accordingly, **IT IS HEREBY RECOMMENDED** that Plaintiff's motion for reversal/remand (ECF No. 16) be **denied**.

IT IS FURTHER RECOMMENDED that the Commissioner's cross-motion to affirm (ECF No. 17) be **granted**.

NOTICE

This Report and Recommendation is submitted to the United States district judge assigned to this case under 28 U.S.C. § 636(b)(1). A party who objects to this Report and Recommendation may file a written objection supported by points and authorities within fourteen days of being served with this Report and Recommendation. Local Rule IB 3-2(a). Failure to file a timely objection may waive the right to appeal the District Court's Order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

DATED: November 10, 2016



C.W. Hoffman, Jr.
United States Magistrate Judge